

This Opinion is Not a
Precedent of the TTAB

Mailed: October 11, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Manuel Alfonso Andrade Oropeza

Serial No. 90780014

Michael E. Dockins of Shumaker, Loop & Kendrick, LLP
for Manuel Alfonso Andrade Oropeza.

Maureen Reed, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

Before Wolfson, Adlin and English,
Administrative Trademark Judges.

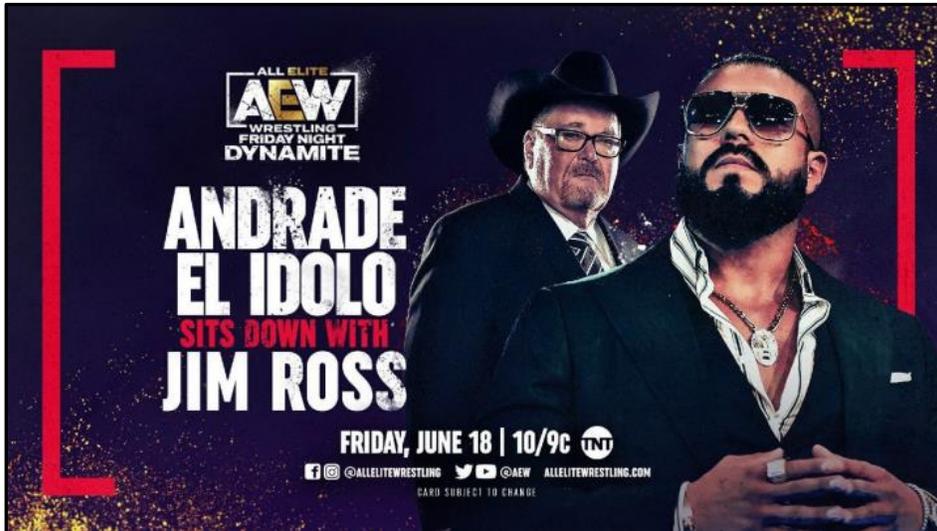
Opinion by English, Administrative Trademark Judge:

Applicant, Manuel Alfonso Andrade Oropeza, an individual, seeks registration on the Principal Register of a stage name he uses as a professional wrestler:

ANDRADE EL IDOLO (standard characters) for, in pertinent part “entertainment services, namely, live appearances by a professional wrestling and sports entertainment personality; entertainment services, namely, personal appearances by a professional wrestling and sports entertainment personality; entertainment services, namely, wrestling exhibits and performances by a professional wrestler and entertainer; providing wrestling news and information via a global computer network; providing online interviews featuring professional wrestling and sports entertainment personality in the field of

professional wrestling and sports entertainment for entertainment purposes” in International Class 41.¹

As shown in the excerpt below, Applicant’s specimens, consisting of “advertisements,” show promotion of Applicant’s services in connection with All Elite Wrestling (“AEW”):²



The Examining Attorney has refused registration of Applicant’s mark for the Class 41 entertainment services, under Section 2(d) of the Trademark Act,

¹ Application Serial No. 90780014, filed on June 17, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming June 4, 2021 as the date of first use anywhere and in commerce for the identified services. The application also identifies goods in International Class 25 that are not involved in this appeal.

The application includes a claim that Applicant owns Registration No. 6441995 for the mark EL IDOLO and a statement that “[t]he English translation of ‘EL IDOLO’ in the mark is ‘THE IDOL.’”

On July 4, 2021, Applicant filed his consent to register the “stage name shown in the mark ANDRADE EL IDOLO.” *Id.* at TSDR 4.

Citations to the prosecution record are to the Trademark Status & Document Retrieval (“TSDR”) system by page number in the downloadable .pdf versions of the documents.

² Application, TSDR 4; Specimen, TSDR 1-2.

15 U.S.C. § 1052(d), based on a likelihood of confusion with another stage name Applicant has used as a professional wrestler, registered to AEW's "rival," World Wrestling Entertainment, Inc. ("WWE"):

ANDRADE "CIEN" ALMAS (standard characters) for "entertainment services, namely, wrestling exhibitions and performances by a professional wrestler and entertainer rendered live and through broadcast media including television and radio, and via the internet or commercial online service; providing wrestling news and information via a global computer network; providing information in the fields of sports and entertainment via an online community portal; providing a website in the field of sports entertainment information; fan club services, namely, organizing and staging events with wrestling fan club members; providing online newsletters in the fields of sports entertainment; online journals, namely, blogs, in the fields of sports entertainment" in International Class 41.³

Both the involved application and cited registration include the following identical consent to register from Applicant:

The name(s), portrait(s), and/or signature(s) shown in the mark identifies MANUEL ALFONSO ANDRADE OROPEZA, whose consent(s) to register is made of record.

³ Registration No. 5734564; registered April 23, 2019 (the "Cited Mark").

We take judicial notice from ENCYCLOPEDIA BRITANNICA that AEW was "creat[ed] ... in 2019" to "rival WWE." <https://www.britannica.com/biography/Cody-Rhodes> (last visited October 10, 2023). "The Board may take judicial notice of information from encyclopedias." *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.24 (TTAB 2013); *see also In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1087 n.3 (TTAB 2016).

There is no dispute that Applicant has used both marks as stage names. Appeal Brief, 6 TTABVUE 2 ("Applicant is a professional wrestler of world renown having performed under a number of stage names for various wrestling companies, including, ... ANDRADE EL IDOLO and ANDRADE 'CIEN' ALMAS"); Examining Attorney's Brief, TTABVUE 12 (citing August 12, 2022 Office action, TSDR p. 8 "show[ing] that Applicant Manuel Alfonso Andrade Oropeza performs under both ring names Andrade El Idolito and Andrade 'Cien' Almas.").

After the Examining Attorney made the refusal final, Applicant requested reconsideration and appealed to this Board. The Examining Attorney denied Applicant's request for reconsideration and the appeal resumed. The appeal is fully briefed.

We affirm the refusal to register Applicant's mark in Class 41.

I. Evidentiary Issues

A. Applicant's Listings of Registrations

In his July 26, 2022 Office action response (at TSDR 7-8), Applicant listed five sets of registrations purportedly owned by third parties. Applicant did not introduce copies of the registrations into the record. The Examining Attorney did not object to the mere list of registrations in her ensuing August 12, 2022 Final Office action. To the contrary, she addressed on the merits Applicant's arguments based on the listed registrations (at TSDR 4).

In his February 13, 2023 request for reconsideration, Applicant relisted the same five sets of registrations (the "Original Registrations") and listed an additional five sets of registrations purportedly owned by third parties (the "Additional Registrations"). TSDR 9-10. Again, Applicant did not introduce copies of any of the registrations. In the February 24, 2023 action denying Applicant's request for reconsideration, the Examining Attorney objected to both the Original and the Additional Registrations on the ground that Applicant did not properly introduce them, advised Applicant how to properly

introduce third-party registrations, and expressly stated that none of the registrations would be considered. TSDR 3.

In her brief, the Examining Attorney maintains her objection to the Original and Additional Registrations.⁴

“The Board does not take judicial notice of registrations, and the mere listing of them is insufficient to make them of record.” *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018); *see, e.g., In re Carolina Apparel*, 48 USPQ2d 1542, 1542 n.2 (TTAB 1998) (same). However, an examining attorney may waive his or her right to object to a list of registrations included in a response to an Office action by failing to object in the next Office action. *In re Broyhill Furniture Indus., Inc.*, 60 USPQ2d 1511, 1513 n.3 (TTAB 2001) (finding examining attorney’s objection to a listing of third-party registrations waived because it was not raised in the Office action immediately following applicant’s response in which applicant’s reliance on the listing as evidence was indicated); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 710.03 (July 2022) (“If the applicant’s response includes improper evidence of third-party registrations, the examining attorney must object to the evidence in the first Office action following the response. Otherwise the Board may consider the objection to be waived.”).

Because the Examining Attorney did not timely object to the Original Registrations listed in the first Office action response and treated those

⁴ Examining Attorney’s Brief, 8 TTABVUE 11-12.

registrations on the merits, it is not surprising that in his request for reconsideration, Applicant relisted the Original Registrations and listed for the first time the Additional Registrations, unaccompanied by copies of the registrations themselves. The Examining Attorney, however, did clearly object to the Additional Registrations in her denial of Applicant's request for reconsideration (i.e., the Examining Attorney's first opportunity for objection). Applicant could have cured the deficiency by filing a request for remand under Trademark Rule 2.142(d)(1), 37 C.F.R. § 2.142(d)(1), but did not do so.

In the circumstances here, we find that the Examining Attorney waived her right to object to the Original Registrations listed in Applicant's July 26, 2022 Office action (TSDR 7-8) and we have considered this list of Original Registrations (but not the registrations themselves as they were not made of record) for whatever limited probative value the list may have. *Broyhill Furniture*, 60 USPQ2d at 1513 n.3. The Examining Attorney did not waive her right to object to the Additional Registrations listed for the first time in Applicant's February 13, 2023 request for reconsideration (TSDR 9-10). Accordingly, we sustain the Examining Attorney's objection to the Additional Registrations and the list thereof and have given them no consideration.⁵

⁵ Specifically, we have not considered the registrations in items 6-8 in the first list in the request for reconsideration at TSDR 9-10 or the entirety of the second list at TSDR 10, consisting of 2 sets of registrations. We also have not considered the arguments made specific to these listed registrations.

B. Hyperlinks in Applicant’s Reply Brief and New Evidence Attached Thereto

In his reply brief, Applicant embedded hyperlinks to new evidence and attached copies of evidence purportedly corresponding to some of these links.

The Board does not consider hyperlinks embedded in briefs. *In re ADCO Indus. – Techs., L.P.*, 2020 USPQ2d 53786, at *2 (TTAB 2020) (web addresses or hyperlinks are insufficient to make the underlying webpages of record); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1195 n.21 (TTAB 2018) (Board does not consider websites for which only links are provided). Further, it is too late to introduce evidence at the briefing stage. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) (“The record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.”); *see also, e.g., In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002) (new evidence attached to brief not considered; “Applicant did not comply with the established rule that the evidentiary record in an application must be complete prior to the filing of the notice of appeal.”).

We therefore give no further consideration to the hyperlinks in, and evidence submitted, with Applicant’s reply brief.

II. Analysis

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (cited in *B&B Hardware, Inc. v. Hargis Ind.*,

Inc., 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co. Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is argument and evidence. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc'ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods [or services].’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). We address the relevant *DuPont* factors below.

A. Similarity or Dissimilarity of the Services, Trade Channels and Classes of Consumers

Under the second *DuPont* factor we consider “[t]he similarity or dissimilarity and nature of the goods or services” and under the third *DuPont* factor we consider “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018). We must base our comparison of the services on the identifications in Applicant’s application and the cited registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed in the identification of goods or services in a particular class. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6 (TTAB 2019); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126, n.5 (TTAB 2015).

Both Applicant’s application and the cited registration identify the following identical services: “providing wrestling news and information via a global computer network.” The involved application also identifies “entertainment services, namely, wrestling exhibits and performances by a professional wrestler and entertainer,” without limitation. These services are broad enough to encompass Registrant’s “entertainment services, namely,

wrestling exhibitions and performances by a professional wrestler and entertainer **rendered live and through broadcast media including television and radio, and via the internet or commercial online service**” (emphasis added). *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *15 (TTAB 2023) (“If an application or registration describes goods or services broadly, and there is no limitation as to their nature, it is presumed that the ‘registration encompasses all goods or services of the type described.’”); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). Accordingly, Applicant and Registrant’s services are in part identical and legally identical.

With respect to the third *DuPont* factor, because both Applicant and Registrant provide “wrestling news and information via a global computer network” without limitation on trade channels or classes of consumers we must presume that the trade channels and relevant purchasers for these services are the same. *Am. Lebanese Syrian Associated Charities, Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (because services are legally identical “the marketing channels of trade and targeted classes of consumers and donors are the same.”); *see also Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (“the TTAB properly followed our case law and presume[d] that the identical goods move in the same

channels of trade and are available to the same classes of customers for such goods”) (internal quotation marks omitted).

We also may presume that Applicant’s “entertainment services, namely, wrestling exhibits and performances by a professional wrestler and entertainer” with no limitations on trade channels or classes of consumers include all normal channels of trade for such services, including rendering the services “through broadcast media including television and radio, and via the internet or commercial online service,” as specified in the cited registration. *See, e.g., Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000) (“When the registration [or application] does not contain limitations describing a particular trade channel or class of customer, the goods or services are assumed to travel in all normal channels of trade.”).

The second and third *DuPont* factors weigh strongly in favor of finding a likelihood of confusion. Applicant does not argue to the contrary.

B. Consumer Sophistication

Pertinent to the fourth *DuPont* factor, Applicant argues that “[c]onsumers are sophisticated enough to realize that an individual can play a different character with a different stage name for different companies for the same services without any confusion.”⁶ There is no evidence in the record

⁶ Appeal Brief, 6 TTABVUE 2.

regarding the purported sophistication of consumers of professional wrestling entertainment. Accordingly, the fourth *DuPont* factor is neutral.

C. Similarity or Dissimilarity of the Marks

The first *DuPont* factor focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion*, 110 USPQ2d at 1160; *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression such that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Here, the average purchasers are consumers of professional wrestling entertainment.

Both Applicant's mark and the Cited Mark are comprised of three words and start with the word ANDRADE. Applicant argues that the "66% difference" in the words comprising the marks obviates a likelihood of confusion.⁷ Consumers, however, are unlikely to focus on the ratio of shared terms in the marks, instead developing general impressions of the marks. *Cf. In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) ("Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.").

The Examining Attorney asserts that ANDRADE is the dominant part of both marks and "consumers could view ANDRADE EL IDOLO and ANDRADE 'CIEN' ALMAS as being two different nicknames for the same person named Andrade."⁸ We agree that consumers are likely to perceive ANDRADE in both marks as a name and the terms "EL IDOLO" and "'CIEN' ALMAS" as adjectives describing a person named ANDRADE. Accordingly, the word ANDRADE is likely to be impressed upon and remembered by consumers as a name and the first part of the marks. *See, e.g., Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("[I]t is often the first part of a

⁷ Applicant's Brief, 6 TTABVUE 4.

Applicant also "openly wonders if the single word and name were JOHN or MIKE or MATT that the rejection never would have been issued, but because the name is ANDRADE such rejections were maintained." *Id.* at 4. We give no consideration to this speculative musing.

⁸ Examining Attorney's Brief, 8 TTABVUE 10.

mark which is most likely to be impressed upon the mind of a purchaser and remembered[.]”).

Applicant argues that confusion is unlikely because his “stage name subsumes another of [his] registrations, EL IDOLO, which the USPTO has already registered and determined is associated specifically with Applicant.”⁹ In providing his consent to register each mark, Applicant has acknowledged that both marks identify, and therefore are associated, with him. The issue before us, however, is not whether consumers will recognize the mark as associated with Applicant as an individual, but whether, given the similarities in the marks, consumers are likely to mistakenly believe that Applicant’s and Registrant’s in part identical and legally identical services emanate from or are sponsored by a common source. The shared dominant name ANDRADE in both marks supports a finding that such confusion is likely.

With respect to pronunciation, consumers have a tendency to shorten marks. *See, e.g., Sabhnani, v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *36 (TTAB 2021) (the “similarity in sound will be greater if consumers engage in ‘the penchant of consumers to shorten marks’”) (quoting *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016)); *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983) (“Although the record does not indicate that applicant’s business is commonly

⁹ Appeal Brief, 6 TTABVUE 2-3. As noted supra, the involved application includes a claim of ownership of Registration No. 6441995 for the mark EL IDOLO.

referred to as ‘Giant’, it does indicate that people have called it by that name, omitting the word ‘Hamburgers’. Thus, in a conversation between two consumers in opposer’s area about a place of business called ‘Giant’, there likely would be confusion about which ‘Giant’ they were talking about.”); *In re Abcor Dev. Corp.*, 588 F.2d 511, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring) (acknowledging that generally, “users of language have a universal habit of shortening full names from haste or laziness or just economy of words”); *Big M. Inc. v. United States Shoe Co.*, 228 USPQ 614, 616 (TTAB 1985) (“[W]e cannot ignore the propensity of consumers to often shorten trademarks[.]”). If consumers were to shorten both marks to ANDRADE, as is likely because ANDRADE is a personal name, the marks would be pronounced the same.

With respect to connotation and commercial impression there are some differences between the marks as EL IDOLO in Applicant’s mark means “the idol” and CIEN ALMAS in the Cited Mark means “a hundred souls.”¹⁰ As explained, however, consumers are likely to perceive these terms as merely modifying and subordinate to the personal name ANDRADE. The marks therefore are likely to engender similar general commercial impressions of a person named ANDRADE. *Chatam Int’l*, 71 USPQ2d at 1946 (JOSE in JOSE

¹⁰ We take judicial notice of the translations of the term “cien” and the singular term “alma,” *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *2 n.17 (TTAB 2019) (Board may take judicial notice of “translation dictionaries that exist in printed format”), at www.collinsdictionary.com/us/dictionary/spanish-english/cien and www.collinsdictionary.com/us/dictionary/spanish-english/alma (last visited October 10, 2023).

GASPAR GOLD emphasizes that GASPAR is an individual's name and "[t]hus, in accord with considerable case law, the JOSE term does not alter the commercial impression of the mark."). Indeed, consumers may perceive Applicant's mark as a variant of the Cited Mark, or vice versa.

In arguing that there are meaningful differences between the marks, Applicant asserts:¹¹

It is ... noteworthy that a search of the electronic records of the U.S. Patent and Trademark Office shows numerous registrations (including the Cited Mark) within the wrestling space, to say nothing of other entertainment services, with overlapping words/names/language that co-exist (numerous additional marks cited).

- 1) CHRISTIAN CAGE (US Reg. No. 6786816) and CHRISTIAN (US Reg. No. 4017648);
- 2) CHRISTIAN CAGE (US Reg. No. 6786816) and BRIAN CAGE (US Reg. No. 6227733);
- 3) BRIAN CAGE (US Reg. No. 6227733) and BRIAN KENDRICK US Reg. 5429291);
- 4) STONE COLD STEVE AUSTIN (US Reg. No. 3659657), STEVE MICHAELS (US Reg. No. 6716837), and STEVE CUTLER (Approved US App. Ser. No. 88/624,573);
- 5) ROCK 'N' ROLL EXPRESS (US Reg. No. 6256726) and MIDNIGHT EXPRESS (US Reg. No. 6617721).

Applicant's argument is unpersuasive. Even though we have considered the foregoing list of registrations, *see supra* Section I.A above, it has limited probative value for a number of reasons. First, the list is missing critical

¹¹ Appeal Brief, 6 TTABVUE 4-5.

information, namely, the owners of the registrations and the specific goods and services identified in the registrations. *See, e.g., Broyhill Furniture*, 60 USPQ2d at 1513 n.3 (considering list of registrations “for whatever limited probative value such evidence may have”). Attorney argument is no substitute for evidence. *Cai v. Diamond Hong*, 127 USPQ2d at 1799.

Second, even if were to credit Applicant’s attorney’s argument that the registrations have different owners, we lack important marketplace information such as whether the registrants entered into any coexistence agreements, whether the marks themselves have actually coexisted in the marketplace without confusion and whether the marks coexist in a crowded field such that consumers have been conditioned to distinguish among the specific marks based on minute differences. *In re Thomas*, 79 USPQ2d 1021, 1028 (TTAB 2006) (fact that marks coexisted on register does not prove that they coexisted in the marketplace without confusion); *see also In re Morinaga Nyugyo K. K.*, 120 USPQ2d 1738, 1745 (TTAB 2016) (third-party registrations are not evidence of use in the marketplace). The record also does not include the file histories for the registrations so we are not privy to why the marks were approved for registration.

Third, the sets of registrations do not justify the registration of Applicant’s mark if confusion with the Cited Mark is likely. *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009) (citing *Plus Prods. v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983)). Indeed, the cited sets of registered

marks are sufficiently different from the marks at issue in the present case that they “merely stand for the principle[s] that the Office determines each case on its own merits” and is not bound by the prior determinations and actions of examining attorneys on different factual records. *Id.*; *see also, e.g., In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Davey Prods. Pty.*, 92 USPQ2d 1198, 1206 (TTAB 2009) (“Previous decisions by examining attorneys in approving other marks are without evidentiary value and are not binding on the agency or the Board.”).

Where, as here, the marks identify services that are in-part identical and legally identical, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Cai v. Diamond Hong*, 127 USPQ2d at 1801 (quoting *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908) (Fed. Cir. 2012)). When we take this into account and consider Applicant’s mark and the Cited Mark “in light of the fallibility of human memory,” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014), we find that the marks, both conveying the commercial impression of a person named ANDRADE, are sufficiently similar to cause a likelihood of confusion.¹²

¹² Applicant argues that “the fact that the Cited Mark and Applicant’s mark may refer to the same person ... does not stand up to scrutiny. ... ‘ANDRADE EL IDOLO’ is a fictitious character name that was created by Applicant and is being ‘played’ by Applicant at this particular moment in time. As is well known in the world of professional wrestling, characters being played by a particular person has, does, and can change at any time.” Appeal Brief, 6 TTABVUE 5. In finding the marks confusingly similar we have not relied on Applicant’s assertion that he has “played” fictitious characters under both marks.

The first *DuPont* factor favors affirming the 2(d) refusal.

III. Conclusion

The second and third *DuPont* factors weigh strongly in favor of finding confusion likely. The first factor also favors a likelihood of confusion. The fourth *DuPont* factor is neutral. Accordingly, we find that Applicant's mark ANDRADE EL IDOLO is likely to be confused with the Cited Mark ANDRADE "CIEN" ALMAS, for in-part identical and legally identical services.

Decision: The refusal to register Applicant's mark for the identified services in International Class 41 under Section 2(d) of the Trademark Act is affirmed. The application will proceed solely with respect to the goods in International Class 25.